Conflicting contracts in sport: resolution through central filing and ad hoc arbitration

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CONFLICTING CONTRACTS IN SPORT: RESOLUTION THROUGH CENTRAL FILING AND AD HOC ARBITRATION

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SYNOPSIS

Introduction

1. Summary
2. Arbitration clause
3. CRB Arbitration Tribunal
4. Secretary of the CRB
5. Costs
6. Contract registration
7. Decision of the Arbitration Tribunal
8. Delivery of licences

Introduction

With increased frequency the rights to the services of a particular athlete are contended by two or more teams. Basketball offers several examples. In Formula 1 the services of Jean Alesi, Mika Hakkinen, Michael Schumacher and more recently Giancarlo Fisichella has been the object of at least apparently conflicting contracts entered into with various teams. The most clamorous recent case was that concerning the soccer player Ronaldo who was claimed by both Barcelona and Inter. Conflicting Contracts has become a regular problem with which many federations are faced.

The purpose of this short paper is to explain, synthetically, the scheme set up, now almost ten years ago, by the FIA, under the name "Contract Recognition Board", hereafter referred to as the "Scheme". It has proven to work efficiently and
has enable several cases to be solved, through arbitration, to the satisfaction of all parties, ultimately - but this essential in sport - since it led to an immediate and final decision.

1. **Summary**

The scope of the Scheme is to avoid – and, as the case may be, solve in a rapid and decisive manner – conflicts regarding the identity of the team for which a particular athlete will perform his services during a given championship. To that effect a "Contract Recognition Board" ("CRB") is set up by the relevant sporting authority. The CRB is composed of (i) a Secretary with which all Contacts regarding the relevant athletes have to be registered, and (ii) an Arbitration Tribunal the purpose of which is to decide upon any conflict arising under Contracts that are – or should be – registered with the Secretary of the CRB. The jurisdiction of the Arbitration Tribunal of the CRB is secured by a standard arbitration clause which has to be inserted in all Contracts regarding the services of the athletes taking part in a particular championship. In order to make sure that the aforesaid is respected by all interested parties – essential for the system to function – the relevant sporting authority (in casu FIA) has undertaken not to deliver a licence to participate in the championship to any athlete (i) whose Contract has not been registered with the Secretary of the CRB and (ii) in the event of conflict with one or more pre-existing Contracts concerning such athlete, who intends to perform his services for a team other than the one specified in the Contract prevailing among those in conflict.

2. **Arbitration clause**

Each and every Contract regarding the services of an athlete who purports to take part in the relevant championship has to contain an arbitration clause, whereby the athlete agrees that (i) certain matters' be submitted to the exclusive jurisdiction of the CRB Arbitration Tribunal and (ii) with regard to interim or conservatory measures, the jurisdiction of any other competent judicial or other body is expressly excluded.

The wording of the clause is, substantially, the following:

"The parties hereto expressly agree that this Agreement is (or, as the case may be, forms part of) a Contract, and moreover agree to submit to the exclusive jurisdiction of the Contract Recognition Board sitting in Geneva, Switzerland, with respect to matters to be determined by such Board pursuant to"
rules], and, in particular, expressly exclude the jurisdiction of any competent judicial or other body as regards interim or conservatory measures in that respect.

3. CRB Arbitration Tribunal

The CRB arbitration tribunal is composed of three members, each of a different nationality, and of three alternate members; all such members and alternate members being qualified lawyers of international standing and experience having no lien whatsoever to any of the parties currently or potentially involved in the relevant sport. In the case of the FIA the members of the Arbitration Tribunal are appointed by the then current President of the International Court of Arbitration of the International Chamber of Commerce in Paris. Obviously, the members could also be designated by any other arbitration entity, or simply be the arbitration court having jurisdiction with respect to all matters within the context of a particular federation.

The quorum for meetings of the CRB Arbitration Tribunal shall be the presence of all three members (or alternate members) thereof. The Tribunal shall meet in Geneva, Switzerland, with such frequency as may be necessary to fulfil its duties and functions.

The procedure of the CRB arbitration shall be set out in the rules determined, from time to time, by the Tribunal.

4. Secretary of the CRB

The Secretary of the CRB (the "Secretary") is a public notary in Geneva. This guarantees a permanent and professional service in a neutral and accessible location, deemed to provide the appropriate confidentiality and protection against any third party's attempt to gain access to – and/or knowledge of – the sometimes highly secret documents that are to be deposited with the Secretary.

5. Costs

The costs of the CRB (both of the Arbitration Tribunal and of the Secretary) are covered by a fixed amount paid, each year, by the teams taking part in the championship, under the control and supervision of the sporting authority.
In addition, the CRB Arbitration Tribunal shall, in each award, decide as to whether and which party shall bear the costs of the particular procedure.

6. Contract registration

Upon the signature of any document which constitutes, or purports to constitute, the contractual basis by virtue of which (i) any athlete shall take part in the relevant championship, or (ii) a person shall have the right (including by way of option) to an athlete's services for or relating to such participation, such documents shall be filed with the Secretary of the CRB.

Simultaneously with the signing of any such contractual document (or upon modification thereof) the parties thereto shall also complete and execute a form (the "Form") indicating the main elements of the relevant Contract (identity of the parties, duration) as well as an express confirmation that the relevant Contract contains the aforesaid standard arbitration clause.

Forthwith, the most diligent party shall cause to be delivered to the Secretary of the CRB a sealed envelope containing, in turn, two sealed envelopes, one marked "Contract" containing a copy of all contractual documents\(^3\) and a second one marked "Form" containing a duly executed original of the Form.

Immediately, upon receipt of the aforementioned, the Secretary shall open the envelope marked "Form" (NB: not the envelope marked "Contract") and shall enter into a register the information contained therein, as well as the exact date and time of receipt of the Form and of the envelope marked "Contract", and shall acknowledge receipt thereof to the relevant parties.

Whenever, based on the information contained in the Form, it appears that the relative Contract has been concluded for the services of an athlete in respect of which another Contract, for the same championship, has already been registered with the Secretary of the CRB, the question as to the priority and precedence between such two apparently conflicting Contracts shall be exclusively and conclusively determined by the Arbitration Tribunal of the CRB.

7. Decision of the Arbitration Tribunal

Unless one of the parties to a prima facie conflicting Contract confirms that it waives its rights thereunder, the Arbitration Tribunal of the CRB shall, forthwith,
call a meeting to which all parties involved shall be convened and shall take part. On such occasion, the relevant envelops marked "Contract" shall be opened and the parties shall be heard. The Arbitration Tribunal shall thereafter, within three days, issue a decision stating which Contract is the prevailing Contract. Such Contract shall be deemed to have precedence over any other Contract in respect of a same period or any overlapping period. The decision shall not deal with any other issue (other than costs).

In making its decision, the Arbitration Tribunal of the CRB shall first resolve on the question as to whether, under the law applicable to the relative Contracts, one or more are null and void, or, in accordance with their terms and provisions, validly terminated (including termination subject to payment of compensation) or expired.

If, thereafter, the Arbitration Tribunal determines that there is indeed more than one valid Contract, and that the same are conflicting, then, irrespective of the date of signature appearing on such Contracts, and regardless of any provision of any law whatsoever, the Contract whose date of registration with the Secretary of the CRB is earliest shall be the prevailing Contract.

The decision of the Arbitration Tribunal shall express its reasons, shall be final and conclusive, and shall be notified, forthwith, to the concerned parties and to the Secretary of the CRB, as well as to the relevant sporting authority. Such authority shall deliver a licence authorising the relevant athlete to take part in the championship only in connection with the team entitled to the services of such athlete in virtue of the decision rendered by the Arbitration Tribunal.

8. Delivery of licences

Within two days after the expiry of the delay for filing entries in the relevant championship, the sporting authority of the respective sport shall submit, to the Secretary of the CRB, a list of the teams applying for entry in the said championship, together with the name of the athletes performing for such teams.

Within two days thereafter, the Secretary of the CRB shall deliver to the aforesaid authority a statement in which he shall confirm that – and which – athletes are the object of registered Contracts relative to the respective teams. Failing such confirmation the athletes (or teams) shall not be delivered a licence by the sporting authority.
The aforesaid procedure shall be repeated in case of changes of athletes or teams during the season of the championship.

As a consequence of the above, in order to be able to take part in the championship, (i) each athlete has to be the object of a Contract registered with the Secretary of the CRB, (ii) such Contract has to contain the standard arbitration clause, and (iii) such Contract cannot be conflicting with any other Contract regarding the same athlete. Therefore, no team will be able to obtain a licence in respect of an athlete who is the object of another – previously registered and still valid – Contract regarding another team.

\[\begin{align*}
^1 & \text{I.e in substance the issue as to who, as a matter of priority, is entitled to his services.} \\
^2 & \text{Reference are to be made here to the appropriate rules of the particular federation.} \\
^3 & \text{In which, for confidentiality reasons and because they are not relevant considering the particular purpose of the Scheme, any amount will have been blanked out.} \\
^4 & \text{In the case, for instance, of so called exit or buy out clauses.}
\end{align*}\]